INDEX

	PAGE
Statement of the Case	1
Argument	4
First, Eighth and Twelfth Assignments of Error	4
Second Assignment of Error	14
Third Assignment of Error	15
Fourth Assignment of Error	16
Fifth Assignment of Error	18
Sixth Assignment of Error	21
Seventh Assignment of Error	24
Eighth, First and Twelfth Assignments of Error	4
Ninth and Tenth Assignments of Error	25
Eleventh Assignment of Error	34
Twelfth, First and Eighth Assignments of Error	4
Thirteenth and Fourteenth Assignments of Error	34

Authorities Cited

Acts of Congress:

Adamson Act, Sec. 2, Paragraph 2	23
Panama Canal Act of—	
Feb. 27, 1909	18
Aug. 24, 1912, (Sec. 2)	2, 4, 6
Aug. 21, 1916	41, 42
June 28, 1922	5
Sundry Civil Act of March 4, 1921	11, 32

Cases Cited:

Atkins v. Fiber Co., 18 Wall., 272; 21 L. Ed., 841	43
Bagnell v. Broderick, 13 Pet., 450	18
Bank v. Yankton County, 101 U. S., 133	17
Binney v. C. & O. Canal Co., 8 Pet., 201; 8 L. Ed., 917	43
Bowman v. Bradley 151 Pa., 351; 17 L. R. A., 213, 217	26
Bristor v. Burr, 121 N. Y., 427; 8 L. R. A., 710	27
Chatard v. O'Donovan, 96 Am. Dec., 782 and notes on same at page 866 of notes at end of volume	26
Davis v. Williams, 30 So., 488; 54 L. R. A., 749	26
Emblem v. Lincoln Land Co., 184 U. S., 664	18
Field v. Seabury, 19 How., 352	18

PAGE

Garfield v. Goldsby, 211 U. S., 249 24
Gibson v. Chouteau, 13 Wall., 99 18
Grady v. U. S., 96 Fed., 238, 239 14
Hatch v. Lamos, 4 L. R. A., 405 30
Henderson v. Wickman, 92 U. S., 259 44
Hester v. Hester, 13 Lea (Tenn.,) 189 29
Hilbish v. Catherman, 64 Pa. St., 154 21
Hughes v. Chatham Overseers, 5 Mann. & G., 54 25
Hylton v. U. S., 3 Dall., 171 ..... 19, 20
Indianapolis & St. L. Co. v. Horst, 93 U. S., 291 43
Jones v. N. Y. G. & I. Co., 101 U. S., 622; 25 L. Ed., 1030 43
Lane v. Hoagland, 244 U. S., 182 24
License Tax Cases, 5 Wall., 471 ..... 19, 20
Lightbody v. Truelson, 39 Mich., 310 27
Meade v. Pollock, 99 Ill. App., 151 26
Murphy v. Ramsey, 114 U. S., 44 17
Nellis v. Munson, 108 N. Y., 453 29
People v. Doe, 36 Cal., 232 21
Pollock v. Farmers Loan., Etc., Co., 157 U. S., 429 20
Priestman v. U. S., 4 Dall., 28; 1 L. Ed., 727 43
Riverside Oil Co. v. Hitchcock, 190 U. S., 316 15
Roberts v. U. S., 176 U. S., 231 ..... 15, 24
Santa Fe Pac. R. R. v. Lane, 224 U. S., 492 15
School Dist. No. 11 v. Batche, 106 Mich., 330; 29 L. R. A., 576 27
Sims v. Sims, 175 U. S., 168 17
Smith v. City of Shakopee, 103 Fed., 240-1 14
Smith v. Jackson, 246 U. S., 388 ..... 14, 22, 23, 31, 33, 43
Springer v. U. S., 102 U. S., 602 ..... 19, 20
The Paulina v. U. S., 7 Cranch, 52 43
U. S. v. Babbitt, 1 Black, 44; 17 L. Ed., 94 43
U. S. v. Eaton, 36 L. Ed. U. S., 591, 594 14
U. S. v. Fisher, 2 Cranch, 358; 2 L. Ed., 304 43
U. S. v. Fitzgerald, 15 Pet., 421 17
Utter v. Franklin, 172 U. S., 423 17
U. S. v. George, 228 U. S., 14 15
U. S. v. Gratiot, 14 Pet., 537 17
U. S. v. McMillan, 165 U. S., 510 17
U. S. v. Nicoll, 1 Payne (U. S.), 646 18
Utah Power Co. v. U. S., 243, M. S., 389 17
U. S. v. Thurston, 143 Fed., 287, 291 14
U. S. v. United Verde Cop. Co., 196 U. S., 207 15
Veazie Bank v. Fenno., 8 Wall., 537 ..... 19, 20
Webster v. Cooper, 14 How., 488 43
Wilkins v. U. S., 96 Fed., 837, 841 14
Wilkinson v. Leland, 2 Pet., 627; 7 L. Ed., 542 43

	PAGE
Executive Orders:	
Jan. 27, 1914	6
Feb. 2, 1914	6, 9, 16
Jan. 15, 1915	7, 14, 15
July 28, 1916	7, 11, 15, 16, 28
Feb. 6, 1917	42
Dec. 3, 1921	10, 11, 20
Dec. 21, 1921	4
Dec. 3, 1922	3
Laws of the Canal Zone:	
Act No. 8, sec. 53	5, 6, 14
Art. 627-31, secs. 26, 27	3, 20
Arts. 825, 871	30
Form 110, Office of Administration	5
Form 151, The Panama Canal, Wash. Office	9
Minutes of Panama Canal Commission, Vol. 1, 1905-1907	6, 13
Pages 37-40	14
Page 68	5
Panama Canal Act, secs. 2, 14	12
Secs. 11, 14	6
Miscellaneous Authorities:	
Adams Glossary	30
Annual Report, Governor of Panama Canal, 1915, p. 460	38
Bouvier Law Dictionary, Vol. 1	12, 21
Civil Service Form No. 1417, Dec. 3, 1904	5
Cooley on Taxation, Vol. 1, p. 1	21
Letter of Gov. Goethals to Secretary of War	38, 40
Letter of Special Atty. for the Canal Zone to Acting Gov. Chester Harding	40, 41
Letter of Atty. Gen. Gregory to Sec. of War Garrison	35, 37
Lewis' Sutherland Statutory Construction, Vol. II, Par. 470	42
Louisiana Civil Code, Art. 433	27
Arts, 537, 540, 626, 627 628, 643 Similar to Code Canal Zone, Arts. 182-192	28
Arts. 540, 628	30
Underhill on "Landlord and Tenant," Vol. 1, p. 304	27
Opinions of the Attorney General:	
Vol. 30, Page 334	6
Vol. 30, Pages 334, 548-553	6, 7, 16, 19, 25, 28
United States Constitution:	
Article I, Section 9, Clause 4	18
Article IV, Section 3	16
United States Statutes:	
35 Stat. L., 658	18
39 Stat. L., 527	13

Supreme Court of the United States.

October Term, 1923
No. 48

HARVEY McCONAUGHEY, FOR HIMSELF AND OTHERS, *Appellant.*

vs.

J. J. MORROW, GOVERNOR OF THE PANAMA CANAL, *et al., Appellees.*

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This case is in this Court on appeal from an order of the Circuit Court confirming an order of the United States District Court in and for the Canal Zone, dismissing a bill brought by the appellant to restrain the appellees from deducting from the salary of the appellant and others in like situation as rent for the use of quarters owned by the United States and occupied by the appellant and also from deducting from said wages charges for electric current and water and to prevent the appellees from charging to the appellant and those in similar circumstances the cost of repairing the building and furniture and the keeping of hedges and grass in proper condition (R. pp. 3-21 inclusive).

From the Bill it appears that the appellant (plaintiff in the Trial Court), is a citizen of the United States, residing at Balboa in the Canal Zone, and employed in the service of the Panama Canal; that there are about 3,000 others in a similar condition; that the appellees are respectively: J. J. Morrow, Governor of the Panama Canal; H. A. A. Smith, Auditor of the Panama Canal, and R. W. Glaw, Paymaste of the Panama Canal (R. pp. 3-5, inclusive).

It further appears that by various acts of Congress sums of money were appropriated for the building of said Canal, and, as an incident thereto "various quarters or dwelling houses for the housing and quartering of American employees of the United States" were erected from said moneys and that said quarters or dwelling houses are the property of the United States (R. pp. 5 and 6); that regulations were made, adopted and promulgated, providing among other things for free quarters for American employees in the service of the United States and that such quarters were provided with moneys appropriated by Congress (R. p. 6).

It further appears that such regulations were ratified and confirmed by section two of the act of Congress of August 24, 1912, "until Congress shall otherwise provide," (R. p. 7), and Congress has since failed to "otherwise provide" (R. pp. 8 and 9); that the appellant was induced to take up the said employment by an agreement made with the appellant, and others on behalf of whom he sues, to furnish "free quarters containing all necessary articles of furniture" and that the appellant and those for whom he sues have performed their portion of the contract (R. pp. 9-11).

It is further alleged that an executive order was issued on the third day of December, 1921, to the effect that a "charge will be made for rent, fuel, electric cur-

rent, water and services in connection with quarters on and after January 1, 1922," and that such executive order is beyond the authority of the president (R. pp. 11-13); that the appellees are about to carry said order into execution and will deduct from the salaries of the appellant and those similarly situated at regular intervals money with which to pay charges and will continue so to do without right or authority and appellees will "lease, rent, let-out, to persons not connected with the United States such quarters" (R. pp. 13-16); that these deductions will amount to $500,000.00 per year and that the appellants are without redress at law and pray a decree enjoining appellees "from directly or indirectly, charging, collecting, deducting, withholding, receiving any money or moneys whatsoever or any parts of wages, salary or compensation from appellant and from any other employee of the United States in the service of the Panama Canal or the Panama Railroad upon the Isthmus of Panama for the said charge of rent, occupancy, etc. (R. pp. 17-20).

Attached to the Bill, and made a part thereof is article No. 627-31 issued by the Governor of Panama, providing for the method of securing and paying for quarters, rentals, fuel, water, electric current and other services (R. pp. 22-33). By sections 26 and 27 (R. p. 28) of said article 627-31 it appears that rentals of quarters will be collected in advance by payroll deduction and other charges will be deducted on the first of each month.

An order issued against the appellees to show cause why an injunction should not be granted (R. p. 34) and the appellees move to dismiss the bill on the ground that it was a suit against the United States and that the appellees were "acting in their respective official capacities by and under the direction of the President of the United States" and that the Court was without jurisdiction to enjoin a co-ordinate branch of the

United States Government in the exercise of its executive discretion (R. pp. 37-38). Said motion was sustained, the District Court filing an opinion (R. pp. 42-72) and the bill was dismissed (R. p. 73), and the appellant duly noted exceptions thereto (R. pp. 74-76). The assignment of error appears in pp. 80-89. In the Circuit Court of Appeals a motion to dismiss was filed by the appellees on substantially the ground that the only question before the Trial Court was the jurisdiction of the Trial Court and that appeal should have been taken directly to this Court (R. pp. 94-95).

The Circuit Court of Appeals denied the motion to dismiss filed in that Court but confirmed in its opinion the District Court (R. pp. 96-100), and affirmed decree of the District Court (R. p. 101). The errors assigned are fourteen in number and appear on pp. 102-105 of the Record.

ARGUMENT.

First, Eighth and Twelfth Assignments of Error.

(Record, p. 102-5.)

For convenience the first, eighth and twelfth assignments of error will be considered collectively because if the Act of August 24, 1912, had the effect of making the regulations concerning the furnishing of quarters, fuel, heat, current and services the law of the zone, then not only was the Executive Order of December 21, 1921, of no effect, but Congress had the exclusive right to change the laws and regulations of the Canal Zone and to make rules for the disposition of property of the United States on the zone, and Sec. 53 of the Laws of the Canal Zone is automatically continued and all executive orders issued since the Act of August 24, 1912, are inoperative, except in so far as they may be consistent with the laws, rules and regulations at that time in force.

From the inception of the work of digging and operating the canal, all American employees were furnished with quarters free of charge, or if they were not available commutation was allowed ranging from eight to fifteen per cent.

The Isthmian Canal Commission, created by the Act of Congress June 28, 1902, on September 3, 1904, adopted an Act known as Act Number Eight, Laws of the Canal Zone, Section 53, which is as follows:

> "The employees in the service of the Government in the Canal Zone, stationed on the Isthmus, whose salaries are $1,000.00 or more per year, shall be entitled to quarters, or in lieu thereof, in each case a sum equal to eight per cent of the annual salary at the option of the Commission." (Laws of the Canal Zone, Page 68).

And the Civil Service Commission published a circular with the above information as an inducement to prospective employees, the same being in the following language:

> "The Isthmian Canal Commission furnishes quarters to its American employees, or at its option in lieu thereof, commutation which has tentatively been fixed at eight per cent of the salary." Civil Service Form No. 1417 of December 3, 1904.

And all employees entering the service from 1904 until 1907 were given a written contract by the Isthmian Canal Commission, providing for free quarters and other privileges during the term of employment. Form No. 110, Office of Administration of Isthmian Canal Affairs.

The said Commission on February 13, 1907, adopted regulations governing employment setting forth the same privileges. Vol. I, Minutes of the Isthmian Canal Commission, 1905-1907.

When the Act of August 24, 1912, known as the Panama Canal Act, was passed, all the regulations of the Isthmian Canal Commission, including Sec. 53 of Act No. 8, were in force. Section 11 of the Panama Canal Act is as follows:

> "That all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the Government and sanitation of the Canal Zone are hereby ratified, and confirmed as valid and binding until Congress shall otherwise provide."

And the final section (Sec. 14) of that Act says:

> "The right to alter, amend, or repeal any, or all of its provisions, or to extend, modify or annul any rule or regulations made under its authority is expressly reserved."

There appears to be no legislation of Congress repealing, annulling, extending, modifying, altering or amending any of these rules or regulations.

Under the authority of the Panama Canal Act, on January 27, 1914, the President abolished the Isthmian Canal Commission and continued to make executive orders until October 14, 1914, when the Attorney General ruled that the practice was illegal. Vol. 30, Ops. of Att'y Gen., Page 334.

An executive order was issued February 2, 1914, providing in the 17th section thereof that a charge would be made for rent, fuel and electric current in accordance with regulations thereafter to be established,

and on January 15, 1915, an executive order issued providing for the rent to be paid beginning March 1, 1915. This last order was revoked by an order of May 15, 1915, with the proviso "Free use of quarters, fuel, current, etc., does not extend beyond June 30, 1916."

On the 16th of June, 1916, the Attorney General rendered an opinion as follows:

> "From the foregoing I reached the conclusion that the term 'compensation' as used in the provision of Section 4, quoted above, refers to salaries or wages payable to employees as separate and distinct from privileges or allowances that may be granted them as to quarters, light and fuel, and that the money value of these privileges is not to be taken into consideration in fixing the salaries of employees in a permanent force of the canal. While obviously the question is not free from doubt, I have been influenced in reaching this conclusion by the thought that if Congress had intended to make it impossible for the Government of the Canal Zone to furnish to employees quarters, light and fuel free of charge—a practice which had long existed and of which Congress had knowledge—it would have employed to that end language more direct, more specific, and perhaps more emphatic than a general limitation upon the compensation of employees." Ops. Att'y Gen., Vol. 30, 548-553.

Finally there came the executive order of July 25, 1916, as follows:

> By virtue of authority vested in me by the Panama Canal Act approved August 24, 1912, it is hereby ordered:
>
> 1. That the Executive Order of January 15, 1915, No. 2,120, is hereby rescinded and abrogated.

2. That, effective July 1, 1916, officers and employees of the Panama Canal and the Panama Railroad Company on the Isthmus of Panama, shall be allowed, where available, quarters free of rent, and shall be furnished fuel and electric current free.

3. That the Governor of the Panama Canal is hereby authorized to assign officers and employees of the Panama Canal and of the Panama Railroad Company, such quarters as may be available for occupancy, and to make all rules and regulations necessary to govern the assignment and occupancy of such quarters, including rules and regulations relative to the furnishing of fuel and electric current to officers and employees of the Panama Canal and the Panama Railroad Company while occupying such quarters.

4. That officers and employees of the Panama Canal and the Panama Railroad Company, for whom quarters are not available or who do not occupy such quarters as may be assigned to them by the Governor of the Panama Canal, shall have no claim against the Government of the United States for commutation of quarters not furnished or not occupied, nor for fuel and electric current not furnished.

5. That all rules and regulations governing the assignment and occupancy of quarters heretofore promulgated by the Governor of the Panama Canal or the Isthmian Canal Commission, not inconsistent with the provisions of this Executive Order, are continued in full force and effect until they may be changed by regulations promulgated by the Governor of the Panama Canal under authority of this Executive Order; and all rules or regulations heretofore promulgated by the Governor of the Panama Canal in connection with the use and occupancy of quarters and the furnishing of fuel and electric current to officers and employees of the Panama Canal and the Panama Railroad Company, in-

> consistent with the provisions of this Executive Order, are hereby rescinded and abolished.

Although this Executive Order, last quoted, did not, in express words, repeal the provision of Section 17 of Executive Order of February 2, 1914, that—

> "A charge will be made for rent, fuel and electric current at such time and in accordance with such regulations as the President may hereafter establish,"

it was most evidently the intention and understanding of the President, the Secretary of War and all officials in charge of the Panama Canal Affairs, that such was the effect of the Executive Order of July 25, 1916. We so say because on dates of May 1, 1917, August 15, 1918, and December 1, 1920, the Panama Canal Commission, from its Washington office, issued and published broadcast throughout the United States an official circular entitled "Manual of Information Concerning Employments for the Panama Canal Service." (Form 151, The Panama Canal, Washington Office.)

Each of these several issues contains what purports to be a copy of the Executive Order containing general conditions of employment (Executive Order of February 2, 1914), and in each of these issues, Section 17 of the Order is quoted, OMITTING THE SENTENCE PROVIDING THAT A CHARGE WILL BE MADE FOR RENT, FUEL AND ELECTRIC CURRENT. Furthermore, in Section 21 of the Manual of May 1, 1917, in Section 20 of the Manual of August 18, 1918, and in Section 20 of the Manual of December 1, 1920, it is expressly stated that quarters with all necessary furniture are furnished to the employees, but that bed linen and similar articles must be supplied by the employee.

As stated above, Appellant and all of the 3,000 American employees of the Government upon the Isthmus of Panama, in the Canal and Panama Railroad service, in whose behalf he sues, were in possession and occupancy of such quarters, under the foregoing regulations, conditions and contracts, at the time this suit was brought, and are still occupying them.

Such was the condition when, on date of December 3, 1921, the President signed an Executive Order, which is quoted verbatim in the Transcript of Record (pages 11, 12, 13), providing that, effective January 1, 1922, the employees of the Panama Canal and of the Panama Railroad must pay, in the form of rent, to the Government enough money to provide 5 per cent for amortization and interest upon the investment of building such quarters and sufficient to cover their repairs, maintenance, and to cover removal of garbage and other works of sanitation. The rent charge must also cover estimated costs of repairs. Then it is provided that all repairs when made shall be again paid for by the employees. Apart from the collection under the guise of rent, the Executive Order provides that other charges shall be made for the use of water, fuel and electric current, all of which had been furnished to employees free of charge under the conditions under which they were employed.

By alleged authority of this Executive Order, Appellee-Defendant in Error, J. J. Morrow, Governor of the Panama Canal, issued orders to Appellees H. A. A. Smith, Auditor, and R. W. Glaw, Paymaster of the Panama Canal, to collect such charges by withholding and making deductions from the salaries earned by Appellant and his co-plaintiffs: deducting, on January 1, 1922, from the salaries earned for the month of De-

cember, 1921, as advance rent for January, 1922, and so on, month by month.

The salaries and wages earned by Appellant and all other employees for the month of December, 1921, were the compensation which had been fixed by the President under direct authority of Congress as given in the 4th Section of the Panama Canal Act of August 24, 1912. Money for the payment of that compensation, so fixed, was appropriated by Congress during the year 1921 in its Sundry Civil Bill for 1922. (Act of March 4, 1921.) And money for the payment of that compensation, so fixed and appropriated, and earned by Appellant and his fellow employees for the month of December, is now available unto Appellees for the payment in full of that compensation. The same may be said of the salaries and wages for each succeeding month.

Believing that the Executive Order of December 3, 1921, under which Appellees were threatening and about to act, is illegal; that it was made in excess of any authority given unto the President by Congress; that an unconstitutional act was about to be done; that they have a vested right in the privileges which they hold by established regulations and customs, confirmed by the Panama Canal Act and reiterated by the Executive Order of July 25, 1916; believing that they have vested right to receive their salaries fixed by authority of Congress and for which the money has been appropriated; and further believing that appellees have no right, power or authority, under the Constitution and laws of the United States to deprive them of their rights, privileges or any part of their salaries without due process of law, the American citizens in the Government employ upon the Isthmus of Panama, in the service of the Panama Canal and

Panama Railroad, by the Appellant brought this suit in the District Court for the Canal Zone, praying that Appellees be enjoined by a temporary order from carrying out said Executive Order; and that upon final hearing, Appellees and their successors in office be finally and perpetually enjoined therefrom.

While no temporary injunction issued the appellees by their attorney, agreed that the money so withheld would not be turned into the Treasury of the United States pending the hearing of this suit.

Let us see if we can ascertain the meaning of Congress as contained in Sections 2 and 14 of the "Panama Canal Act." It provides that "ALL Laws, orders, regulations and ordinances adopted and promulgated" are "RATIFIED AND CONFIRMED AS VALID AND BINDING UNTIL CONGRESS SHALL OTHERWISE PROVIDE."

By the same Act in Section 14, Congress expressly reserves to itself "The right to alter, amend or repeal any or all of its provisions, or to extend, modify or annul any rule or regulation made under its authority." "All," appearing in Section II is a most comprehensive term. It is defined thus:

> Completely, whole, the whole amount, quantity or number.
>
> It is frequently used in the sense of "each" or "every one of."
>
> Bouvier's Law Dictionary, Vol. I, citing 143 Mass. 442.
>
> This meaning is confirmed by numerous judicial decisions.

At the 120th meeting held on February 13, 1907, the Isthmian Canal Commission, formally adopted as a regulation the giving of free quarters, fuel, light, water

and other services. Minutes of Isthmian Canal Com. 1905-1907, Vol. I.

And no change up to the time of the passage of the Panama Canal Act was made either by Congress or the Commission. This practice was therefore a "Regulation" on August 24, 1912, and it seems perfectly obvious that Congress could have had no other intention than to make it a part of the law for the reason that this custom, practice or regulation was known to Congress many years prior to the enactment of the Panama Canal Act, and by use of the word "ALL" it must have intended to include "each and every one of" the regulations then in force.

Moreover, Congress itself, as well as the administrative officials of the Canal Zone, realize that the Panama Canal Act did have the effect of continuing in force "All laws, orders, regulations and ordinances adopted and promulgated" in the Canal Zone. This is shown by the passage of the Act of August 21, 1916, Ch. 371, 39 Stat. L. 527, which "until otherwise provided by Congress" authorizes the President to make rules and regulations, "in matters of sanitation, health and quarantine" for "levying, assessing and collecting" taxes, "regulating, licensing and taxing the use and operation of vehicles" and to "exercise police power." If Congress had not retained the exclusive right to legislate, why was this legislation necessary? The very language used in Sec. 2 of the Panama Canal Act shows Congress intended to include all sorts of regulatory provisions. The "laws" referred to are the "Laws of the Canal Zone," printed at the Government Printing Office and promulgated by the Isthmian Canal Commission and include Sec. 53 of Act 8 hereinbefore referred to. The "orders" were the various executive orders issued prior to the Act; the "regulations" means the enactments of the Commission and the "or-

dinances" were those enacted by authority of Act Seven of the Laws of the Canal Zone.

Laws of the Canal Zone, pp. 37-40.

It might be argued that it would have required an Act of Congress to make this practice of giving "free quarters, rent, etc.," to American employees the effect of law but Congress can ratify an Act the same as any principal may authorize an unauthorized act of a servant and when Congress so does, the acts ratified have the same effect as if they had been originally passed by Congress.

U. S. v. Eaton, 36 L. Ed., U. S. 591, 594.
Wilkins v. U. S., 96 Fed. 837, 841.
Grady v. U. S., 96 Fed. 238, 239.
Smith v. City of Shakopee, 103 Fed. 240, 241.
Dimmick v. U. S., 121 Fed. 638, 642.
U. S. v. Thurston Co., Neb., 143 Fed. 287, 291.
Smith v. Jackson, 241 Fed. 747, 759.

Second Assignment of Error.

(Record, p. 102-5.)

The Circuit Court of Appeals erred in holding that the Executive Order, January 15, 1915, was notice to Appellant and others that the practice of giving free rent and other services might be discontinued.

If, as we have seen in the argument covering the first assignment of error, Congress retained the exclusive right to legislate over such matters, then it must necessarily have followed that the Executive Order of January 15, 1915, in so far as it attempted to abrogate the "law" contained in Section 53 of Act 8, of the "Laws of the Panama Canal Zone" and the "Regulation" made by the Canal Commission on February 13, 1907, must be wholly inoperative and void as beyond

the power of the President, and could confer no authority on the Governor and other officials for the Canal Zone. An unauthorized act cannot be notice to any one, This is not a case where it is sought to control an officer of the government in discharging an official duty requiring the exercising of judgment and discretion.

Riverside Oil Company vs. Hitchcock, 190 U. S. 316.

But is rather one where the meaning of an Act of Congress is quite "Plain and unmistakable," and an administrative construction that undertakes in any way to modify such meaning is unwarranted.

Roberts vs. U. S., 176 U. S. p. 221.
Santa Fe Pacific Railroad Company vs. Lane, 224 U. S. 492.
U. S. vs. United Verde Copper Company, 196 U. S. 207.

An administrative officer of the government is powerless to make regulations that constitute statutes —his power to make regulations is confined to administrative matters.

U. S. vs. George, 228 U. S. 14.
U. S. vs. Copper Company, 196 U. S. 207.

Third Assignment of Error.

(Record, p. 102-5.)

The third assignment of error asserts that the Circuit Court should have given effect to the Executive Order of July 25, 1916. This order is effective only to the extent that it recognizes the injustice, invalidity and illegality of the order of January 15, 1915, and other orders that attempted to do away with the granting of free quarters and other privileges, and is un-

doubtedly the result of the opinions of the Attorney General rendered the 16th of June 1916 and October 14, 1914.

> Op's. of Attorney General, Vol. 30, pp. 334, 548-553.

And it was undoubtedly intended to repeal Section 17 of the Executive Order of February 2, 1914, providing for charge for rent, fuel and electric current in accordance with regulations to be thereafter made by the President for the reasons given in support of the argument on the first, eighth and twelfth assignments of error herein (See p. 4 of this brief).

In so far as the administrative officers of the Canal Zone may attempt, under authority of the order of July 25, 1916, to curtail, alter, modify or repeal the "Laws, orders, regulations and ordinances" in force on August 24, 1912, the date of the passage of the "Panama Canal Act," said order can have no force by reason of the arguments hereinbefore submitted.

Fourth Assignment of Error.

(Record, p. 102-5.)

The fourth assignment of error raises the question of the power of the President to dispose of property of the United States without specific authority of Congress. This is based on the second clause of Section 3, Article 4 of the United States Constitution, which says

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory *or other property* belonging to the United States."

In the territories Congress has the entire dominion and sovereignty, national and local, Federal and state,

and has full legislative power over all subjects upon which the Legislature or State might legislate within the State.

Simms vs. Simms, 175 U. S., 168.
U. S. vs. McMillan, 165 U. S., 510.

It may make a void act of the territorial legislature valid, and a valid act void.

Bank vs. Yankton County, 101 U. S., 133.
Utter vs. Franklin, 172 U. S., 423.

But the personal and civil rights of the inhabitants are secured to them by the same principles of constitutional liberty which restrain all the agents of government.

Murphy vs. Ramsey, 114 U. S., 44.

Section 45 of Circular No. 627-31, issued by the executive office of the Panama Canal, provides for renting of quarters to other than employees of the Canal, but no appropriation of public land can be made for any purpose except by the authority of Congress.

U. S. vs. Fitzgerald, 15 Pet., 421.
Utah Power Company vs. U. S., 243 U. S., 389.

Moreover the words "dispose of," used in Section 3 of Article 4, is held to vest in Congress alone the power not only to sell but to lease the land of the United States.

U. S. vs. Gratiot, 14 Pet., 537.

Congress has the absolute right to prescribe the mode of conveyance, the times and conditions thereof, and who shall be the grantees.

Gibson vs. Chouteau, 13 Wall., 99.
Emblem vs. Lincoln Land Company, 184 U. S. 664.

Congress likewise has the power to declare the effect of titles emanating from the United States.

Bagnell vs. Broderick, 13 Pet., 450.
Field vs. Seabury, 19 How., 352.

This control over its property is exercised to the same extent that an individual can control his property.

Light vs. U. S., 220, 523.

It has been held that the Treasury Department has no right to sell public property without the authority of an Act of Congress, and that it cannot ratify an unauthorized sale by the War Department.

U. S. vs. Nicoll, 1 Payne (U. S.), 646.

Moreover Congress specifically provides for the leasing of public lands in the Canal Zone to the "Head of a family" or a person "Over the age of 21," applying in good faith "for the purpose of actual settlement and cultivation," but in this Act no provision for the leasing of land for ordinary dwellings is made.

Act of Feb. 27, 1909, Ch. 224, 35 Stat. L. 658.

Fifth Assignment of Error.

(Record, p. 102-5.)

This assignment of error covers the question of whether the withholding of moneys from the appellant and those for whom he sues constitutes a "direct tax" and also is in conflict with Art. I, Sec. 9, Cl. 4 of the United States Constitution requiring "Duties, imposts

and excises" to be uniform throughout the United States (Record, page 103).

Appellant either owns an estate in the land which he occupies, or it is an incident or usufruct of his employment. We believe it is an interest similar to the situation that arises when a person has a license coupled with an interest, the interest being in this case the right to use the quarters and avail himself of the privileges, while in the Federal employment on the canal zone, and analagous to, if not the same as a common law tenancy from year to year. If this contention be correct undoubtedly the moneys withheld and threatened to be withheld constitute a direct tax.

The Attorney General on June 19, 1916, in construing the word "Compensation" used in Section 4 of the "Panama Canal Act" said it

> "Refers to salaries or wages payable to employees as separate and distinct from the privileges or allowances that may be granted them as to quarters, light and fuel, and that the money value of these privileges is not to be taken into consideration in fixing the salaries of employees in the permanent force of the canal."

Op's. of Atty. Gen., Vol. 30, pp. 548, 553.

A tax upon property holders in respect of their estates, or the rents therefrom, which cannot be avoided is a direct tax.

Hylton vs. U. S., 3 Dall., 171.
Veazie Bank vs. Fenno, 8 Wall., 537.
Springer vs. U. S., 102 U. S., 602.
License tax cases, 5 Wall. 471.

The framers of the Constitution intended a broad construction to be given to the phrase "Capitation"

because there was added the clause "or other direct tax," thus avoiding any construction which might narrow the intention.

Pollock vs. Farmers Loan, etc., Co., 157 U. S., 429.

Certainly if the appellees can carry into execution their intention as expressed in Circular 627-31 to deduct each month from the wages or salaries of the appellant and others for whom he sues, this deduction is "in respect of their estates" and "cannot be avoided."

Hylton vs. U. S.
Bank vs. Fenno.
Springer vs. U. S.
License Taxes Cases, *supra.*

As concerns Article I, Section 8, it is perfectly obvious that if this deduction for rental and other purposes is a tax on those situated like the appellant it is obviously not uniform, since the Executive Order of December 3, 1921, and the regulations framed to carry it into effect apply only in their very terms to the canal zone.

If we examine closely the Executive Order of December 3, 1921, and the circular designed to give it effect, it will be apparent that the object of the rent is to "amortize the investment on the basis of a total average life of thirty-six years, to return 5% for amortization and interest on the investment, and in addition to cover the amount fixed for expenditure and repairs due to ordinary wear and tear," etc.

Record, page 43, Section II of Executive Order, Dec. 3, 1921.

This meets the following definitions of taxes.

"Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs."

Cooley on Taxation, Vol. 1, page 1.

"A pecuniary burden imposed for the support of the government."

Bouvier Law Dic., citing 17 Wall., 322.

"A sum or rate imposed by governmental authority for a public object or purpose."

Id., citing 150 Pa., 118; 107 Mo., 464.

"The general object of taxation is the raising of revenue for government purposes."

People vs. Doe, 36 Cal., 222.

"Taxes are the revenue collected from the people for objects in which they are interested; the contributions of the people to things useful and conducive for their welfare."

Hilbish vs. Catherman, 64 Pa. St., 154.

Sixth Assignment of Error.

(Record, p. 102-5.)

This assignment of error is based on the claim that the injunction should have been granted preventing the appellees withholding moneys appropriated for the payment to appellant and those for whom he sues, which moneys have been properly appropriated.

We believe that this case is covered by the case of Smith vs. Jackson, 241 Fed. Rep., 747, affirmed in 246 U. S., 388, which was a case where the same appellees attempted to deduct from the salary of a Federal District Judge in the Canal Zone moneys to pay rent for the quarters occupied by him in the zone. It is said in the Jackson case that—

> "It seems to me that upon reason and authority, when the salary has been fixed by law and the money appropriated for its payment and the officer who controls the funds refuses to pay the salary to the one entitled thereto," mandamus is a proper remedy.

Further the court said:

> "It seems fair to say that if Congress had intended the judge to pay rent for the occupancy of a house in the Canal Zone, when it required him to reside there, it must be presumed that it would have been so stated in the Adamson Act. The law-makers knew that the United States Government was the owner of all buildings in the Canal Zone, and that the judge required to reside there must occupy one of those buildings. By way of reinforcement of this view it may be said that the members of Congress were familiar with the fact that under the acts or ordinances of the Isthmian Canal Commission the former members of the Canal Zone judiciary had occupied houses free of rent. Act one of the Isthmian Canal Commission of August 16, 1904, in referring to each of the Circuit and Supreme Court judges, provided as follows:
> "During his term of office he shall be furnished a dwelling house or apartment, or in lieu thereof a sum of money equal to 8% of his annual salary, at the option of the Commission."

The Adamson Act continued in operation all the acts of the Isthmian Canal Commission not repugnant to the provisions of that Act itself. This is shown by Section 2, paragraph 2, of the Act.

> "* * * This provision has direct reference to the Courts; consequently, when the Act required the judge to reside within the Canal Zone his occupancy of a house belonging to the Government or its subsidiary, in the Canal Zone, free of rent, when there had never been any stipulation for the payment of rent, cannot be considered an emolument. It was no increase of salary. It was no profit. His occupancy of the house as a residence constituted an incident, and perhaps also an inducement, to the discharge of his duty while away from his home in the United States."

The houses were erected not for rental purposes, but for the use of the employees of the Panama Canal and Panama Railroad and other governmental functionaries who might from time to time in the discharge of their official duties, be required to reside in the Canal Zone. * * * It will not be insisted that it was the intention of the United States to engage in the real estate business for profit, or that there was an intention on the part of Congress that a rental should be charged against judicial or other officers who were obliged to live in the Canal Zone. * * * It may be well to remember in connection that no private persons could erect a house on the Canal Zone for his individual use. The Judge was required by Act of Congress to reside in the Canal Zone and under the circumstances it was not possible for him to do so except by living in one of the houses owned by the Government. That he should occupy such house seemed to have been understood as being in the con-

templation of Congress. In the absence of any legislative expression it cannot be believed that it was the intention of the judge, whose office was created by Congress, and who was required to reside in the Canal Zone, should rent quarters from the Government or from any subsidiary governmental agency.

Smith vs. Jackson, 241 Fed. Rep., 747, affirmed in 246 U. S. 388.

Congress has from year to year in the Sundry Civil Bill appropriated money sufficient to pay the "salaries" or "compensation" fixed by the President pursuant to Section 4 of the "Panama Canal Act," and these moneys belong to the appellant and those for whom he sues, and the language of the "Panama Canal Act" in Sections 2, 14 and 4 (which allows the President to fix the "compensation of such persons" as may be necessarily employed "until such time as Congress may by law regulate the same"), is so "plain and unmistakable" that the appellees have no power or right to attempt to construe such language, and it is their duty to follow the plain meaning of these enactments and to give the appellant the relief sought.

Garfield vs. Goldsby, 211 U. S., 249.
Roberts vs. U. S., 176 U. S., 221.
Lane vs. Hoaglund, 244 U. S., 182.

Seventh Assignment of Error.

(Record, p. 102-5.)

The opinions of the Attorney General are entitled to great weight, and in so far as they have been expressed they undoubtedly hold that after August 24, 1912, the date of the passage of the "Panama Canal Act," the President had no power to change any of

the laws then in force in the Panama Canal Zone by an executive order.

Op's of Atty. Gen., Vol. 30, pp. 548, 552, 553.

Ninth and Tenth Assignments of Error.

(Record, p. 102-5.)

For convenience we will consider these assignments of error together because the reasoning applicable to one is applicable to the other. The assignments are based upon the theory that the appellant has either a property or vested right by contract or otherwise.

The question may be considered under these assignments whether as between appellant and the United States there exists simply the relationship of MASTER AND SERVANT or that of LANDLORD AND TENANT.

It is said in the case of Hughes vs. Chatham Overseers, 5 Mann. & G., 54, that "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will * * * and if he do so the servant becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration."

The opinion of Mr. Acting Attorney General John W. Davis to the Secretary of War, 30 Op's Atty Gen., 548, might be taken to intimate that in the conception of this official the use of quarters by employees was not entirely an incident to their employment, and that in their use the employees were not strictly within the sole relationship of master and servant with the Government but rather that of Landlord and Tenant, enjoying the use of their quarters under the terms of a gratuitous lease, or one for the consideration of

which the United States as Landlord received their labor and obtained the benefit of their presence upon the Canal Zone.

However, and under either phase of the case—whether the relationship between appellant and the United States be that of simply master and servant or that of landlord and tenant—authorities are hardly necessary to convince the Court that he, as well as his fellow-employees, have property rights and interests in the houses which have been given them for their occupancy during their employment. If the relationship be the former, then the use of quarters is part of the contract price or agreement made between the United States and appellant for his services, and he has the same right to, and property in, his quarters as he has to his salary.

> Bowman vs. Bradley, 151 Pa. 351, 17 L.R.A. 213, 217.

If the latter, then appellant has the same rights to and property in his quarters as any other tenant would have under a contract of lease, and the general law of landlord and tenant would apply.

We believe, however, from the majority of the cases, that the real relationship between appellant and the United States is simply that of master and servant; and the use of his quarters is an incident to his employment.

> Chatard vs. O'Donovan, 96 Am. Dec. 782, and notes on same at page 866 of notes at end of volume.
> Davis vs. Williams, 30 So. 488, 54 L.R.A. 749.
> Meade vs. Pollock, 99 Ill, Ap. 151.
> Bowman vs. Bradley, 151 Pa. 351, 17 L.R.A. 213.

School District No. 11 vs. Batche, 106 Mich. 330, 29 L.R.A. 576.
Bristor vs. Burr, 121 N.Y. 427, 8 L.R.A. 710.

We are further constrained in so believing because no one has been authorized or delegated by Congress to dispose of the dwelling houses upon the Canal Zone by lease, deed or otherwise, or to create the relationship of landlord in the United States as to Appellant and his fellow employees.

This being true, what, if any property right or interest has appellant to or in his quarters?

Underhill on "Landlord and Tenant," Vol. 1, p. 304, refers to Lightbody vs. Truelson, 39 Minn. 310, and quotes from Bowman vs. Bradley, *supra,* in support of his statement that where a servant is furnished a dwelling as an incident to his employment, and is dispossessed therefrom by the master or owner of the premises, the servant has a remedy against the master for damages for a breach of the contract of employment. If this be true, he has a property interest in his dwelling.

It must be remembered that the Canal Zone is a civil law jurisdiction. Our substantive code governing the rights of property is the Civil Code of Panama, very similar to the Civil Code of Louisiana.

Under the civil law the rights which plaintiff has acquired to his dwelling would be a usufruct, or use and habitation, which are defined in the Civil Code of Louisiana as follows:

Article 433:

"Usufruct is the Right of Enjoying a Thing. Usufruct is the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantages which it may produce, provided it

be without altering the substance of the thing."

Article 537:

"Usufruct is an incorporeal thing because it consists in a right."

Article 540:

"Usufruct may be established by all sorts of titles; by a deed of sale, by a marriage contract, by donation, compromise, exchange, last will, and even by operation of law."

Article 626:

"Use is the gift given to any one to make a gratuitous use of a thing belonging to another, or to exact such a portion of the fruit it produces, as is necessary for his personal wants and those of his family."

Article 627:

"The right of habitation is the right of dwelling gratuitously in a house the property of another person."

Article 628:

"The rights of use and habitation are established and extinguished in the same manner as usufruct."

Article 643:

"The right of habitation can neither be transferred, let, nor given to any one else; it is, as well as the use, exclusively a personal right."

These subjects are similarly treated in the Civil Code for the Canal Zone, Articles 182-192.

Relying upon the authority of the opinion of Attorney General Davis to the Secretary of War of June 19, 1916, Vol. 30, Op. Atty. Gen. 548, which was followed a month later by the executive order of President Wilson of July 25, 1916, giving to all employees of the Panama Canal and Railroad the use of quarters and other privileges during the term of their employment, we believe it cannot be doubted that a usufruct or right of habitation and use became vested in

appellant and his fellow employees; and that being a right, it cannot be taken from him without due process of law.

Although it might be true, as stated in the opinion of the Attorney General, *supra,* that the right of use and habitation of the quarters was not considered as part of the compensation authorized by Congress, but was given as an extra privilege to the employees, still it must be remembered that a use or right of habitation as stated in the Codes of Louisiana and of the Canal Zone, may be acquired by donation as well as by purchase. In the present case, while appellant has paid nothing to the Government for the right of use and habitation which he possesses, yet that right was given to him by the Government in its own interests; that is to say, it was one of the special inducements held out by the Government in order to bring its employees to the Isthmus of Panama, and keep them contented when once there!

The right of habitation is no less a right, and no less property, because it is incorporeal.

> "Incorporeal property is a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only, of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it."
> Nellis vs. Munson, 108 N.Y., 453.

Incorporeal property may be the subject of a gift or donation.

> 20 Cyc., 1211, citing Hester vs. Hester, 13 Lea (Tenn.) 189.

The right of use or habitation may be established by gift or donation.

Arts. 540 and 628, Civil Code of Louisiana, and same provisions contained in Arts. 825 and 871 of Civil Code of Canal Zone.
"Donatio perficitur posesione accipientis."
Adams Glossary.
Brooms Leg. Maxims.
14 Cyc. 867.

When the Government offered and promised to give appellant the right of habitation and use of a certain dwelling house during the term of his employment and established laws, rules and regulations and made Executive Orders to the effect, and did actually assign appellant to such habitation thereof; and appellant accepted the use and habitation of the house and took possession thereof then the right of habitation of said house, for the term of employment, became perfect and complete as between appellant and his donor, and appellant acquired a property interest in the use of said house.

> "A gift inter vivos when perfected, unless obtained by fraud, duress, or undue influence, operates as a complete transfer of the subject thereof from the donor to the donee, and the title thereby acquired by the donee is as good as between the parties and those claiming under them as a title acquired by deed or purchase."
> 20 Cyc., 1216, and cases cited in note 99, especially Hatch vs. Lamos, 4 L. R. A., 404.

The United States through the President, having given the use of dwelling houses to the employees on the Isthmus, and said gift having been made complete by acceptance, a succeeding President cannot revoke the gift. If the right of habitation be thus taken away from appellant it deprives him of his property without due process of law.

The Court erred in holding that no property rights of appellant will be effected by the threatened acts of Appellees, in depriving appellant of his right of habitation, acquired by donation from the Government.

But the learned Courts below have obviously overlooked the fact that appellant's complaint also charges that appellant and his co-plaintiffs have worked for the Government during the month of December 1921, at salaries fixed by authority of Congress, and have earned wages that are now due and for the payment of which money has been appropriated by Congress. That the money so appropriated is now in the hands of appellees, and that appellees are threatening to make unlawful deductions from that money and to withhold the payment of part thereof from appellant and his co-plaintiffs.

That Appellant has not a property interest in his wages so earned and in the money which Appellees are threatening to deduct therefrom, scarce need be argued.

This case is on all fours in this respect with the case of Smith vs. Jackson, 241 Fed., 747, affirmed in 246, U. S. 388.

Judge Jackson was appointed under the authority of Sec. 8 of the Panama Canal Act, providing that there shall be a District Judge, to be appointed by the President, and to receive the same salary as is paid to District Judges in the United States. His salary was appropriated by the Sundry Civil Act of March 3, 1915.

Appellant and all of his co-plaintiffs were appointed under authority of Sec. 4 of the same Act of Congress, providing that "all persons necessary for the completion, etc.—shall be appointed by the President or by his authority—and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may, by law, regulate the

same." The compensation was fixed; Appellant and his fellow employees have performed their services and Congress, by the Sundry Civil Act of March 4, 1921, has appropriated the money for the payment of that compensation, so fixed under the authority of the Panama Canal Act.

The Sundry Civil Appropriations Act of March 4, 1921, in so far as it relates to appropriations for the Panama Canal, reads:

> "For every expenditure requisite for and incident to the maintenance and operation, sanitation, and civil government of the Panama Canal and Canal Zone, including the following: Compensation of all officials and employees * * * all to be expended under the direction of the Governor of the Panama Canal and accounted for as follows: For maintenance and operation of the Panama Canal: $7,250,000. For sanitation * * * and Canal Zone * * * $900,000. In all $9,000,000 to be available until expended."

Appellant's salary has been appropriated, and is just as much due unto him, as was Judge Jackson's in the Smith-Jackson case. Appellant has exactly the same property interest in his salary as Judge Jackson had in his. The fact that Judge Jackson was a judge, was a mere incident of that case, and not the controlling principle of the decision. The Appellant, who is engaged in the work of operation and maintenance of the Canal and his three thousand fellow-employees who are employed in the works of operation, maintenance, sanitation and civil government are just as essential to the canal project, and are entitled to the same protection of law as was the judge.

The deduction is being made from Appellant, as it was from Judge Jackson, for an alleged charge for rent arbitrarily fixed, without the agreement or consent of Appellant, and in violation of the agreements and conditions under which he and his fellow-employees were employed. And furthermore, as was not urged in Judge Jackson's case, the present charge against Appellant is being made contrary to law and in excess of any authority to charge for or collect the same.

The deduction made from Judge Jackson's salary was not openly stated as in this case to be for the purpose of providing, among other things, 5 per cent for amortization and to return interest on the investment of building the houses which have been builded and used in the past for the purpose of constructing the Canal.

Appellant clearly has a property interest in the money which is thus being withheld from him, and he has been deprived of that property without any process of law whatsoever.

> "It seems to me," said Judge Clayton—and his language was adopted and approved by this Honorable Court—"that upon reason and authority, when the salary has been fixed by law and the money appropriated for its payment, and the officer who controls the fund refuses to pay the salary to the one entitled thereto, mandamus is the proper remedy and the only remedy which the aggrieved party can invoke for the protection and enforcement of his rights."
>
> Smith vs. Jackson, 241 Fed. 747, 776.

If that be good law, then the correlative must likewise be true, that when Appellant's salary has been fixed by law, i. e., fixed by the President under direct

authority and direction of an Act of Congress, and the money appropriated for its payment, and the officers who control the fund threaten and are about to withhold it, or refuse to pay it, then injunction is the proper and only remedy which the aggrieved party may invoke for the protection of his rights and to protect himself and his property from irreparable injury and loss.

We respectfully contend that the Court committed grievous error in holding that Appellant has no property rights which the Court has jurisdiction to protect.

Eleventh Assignment of Error.

(Record, p. 102-5.)

That the United States Circuit Court of Appeals for the Fifth Circuit erred in holding, under authority of the case of Bruce vs. Manchester & King Railroad, 117 U. S. 514, that the appellant, Harvey McConaughey, is the sole plaintiff in this cause, and in failing to hold that all those in whose behalf he sues, as set forth in his complaint, are co-plaintiffs in his action.

The case of Sheppard against the Railroad on the authority of which the above holding was made is not analagous because the court's jurisdiction in that case was invoked on the ground of diverse citizenship, and the amount in controversy between the plaintiff and defendant did not reach the jurisdictional amount of $5,000.00 anywhere under that procedure, but this is a case where a constitutional right is invaded, and the amount in controversy is immaterial.

Thirteenth and Fourteenth Assignments of Error.

(Record, p. 102-5.)

The thirteenth and fourteenth assignments of error are based on the Circuit Court of Appeals affirming the Trial Court, and not reversing the Trial Court.

Counsel respectfully urges in support of these assignments all that has been said in connection with the argument on the first, eighth, and twelfth assignments, and in addition begs leave to show the court that the authorities actually in charge of the Government of the Canal Zone and operation of the Canal railroad, as well as Congress, knew and understood that Section II of the Panama Canal Act had the effect of continuing in force the regulations made before the passage of said Canal Act by authority of the President by the Isthmian Canal Commission. We have seen that the Act of August 21, 1916, was expressly passed to give the President power heretofore referred to. On November 5, 1914, Mr. Frank Feuille, the then Special Attorney for the Panama Canal, submitted to Col. Goethals, the then Governor of the Canal, a brief opposing the opinion of the Attorney General of October 14, 1914, arguing that the President had power to make all needful regulations. The brief was submitted by the Secretary of War to the Attorney General for his opinion, and the Secretary of War received the following reply:

Office of the Attorney General.
Washington, D. C.,
January 16, 1915.

Hon. Lindley M. Garrison,
Secretary of War.

Dear Mr. Secretary:

I acknowledge receipt of yours of the 4th inclosing copy of a memorandum dated November 5th, 1914, addressed to Colonel Goethals by Mr. Frank Feuille, Special Attorney on the Isthmus, on the subject of amending the Penal Code, and asking whether the points brought out in this memorandum in any way modify my formal

opinion given to the President on October 14, 1914.

After giving careful consideration to this memorandum, I am constrained to adhere to my opinion of October 14th, above referred to. In addition to what is stated in that opinion, I call your attention to additional evidence of the intent of Congress in passing the legislation in question which I omitted in the former opinion;

In the hearing before the Committee on Interstate and Foreign Commerce, second session, Vol. 3, pages 245 to 248, held on February 12, 1912, the Secretary of War, Henry L. Stimson, testified and submitted a draft of a bill prepared by Judge Feuille. Section 2 of this bill read as follows:

Section 2. That, subject to the provisions of this acts, all the civil and military powers of the United States in the Canal Zone are hereby vested in the President of the United States, including the power to make all laws, rules or regulations necessary for the government of the Canal Zone and for the construction, maintenance, and operation of the Panama Canal, as well as all the rights, powers and authority granted to the United States by the terms of the treaty described in Section 1 of this act.

The power and authority hereby conferred upon the President may be exercised by him through such persons as he may designate from time to time, and in the manner as he may direct, for the government of the Canal Zone and the maintenance and protection of the inhabitants thereof in the free enjoyment of their liberty, property, and religion, and for the construction, maintenance, and operation of the Panama Canal. All orders and regulations with respect to the government of the Canal Zone heretofore made by the President, or pursuant

to his directions and authority, are ratified and confirmed without prejudice to the power of the President to revoke or amend the same in accordance with the authority granted to him by this act.

And the President in his discretion may create and organize a civil and political establishment for the government of the Canal Zone, with power to sue and be sued, and with such other governmental powers as to him may seem necessary and convenient to carry out the purposes of this act; and he may order, reorganize, abolish, or re-create any such establishment when in his judgment is it necessary to do so.

It will be noted, from the words contained in the above bill "without prejudice to the power of the President to revoke or amend the same in accordance with the authority granted to him by this act, and the previous words vesting in him "the power to make all laws, rules, or regulations necessary for the government of the Canal Zone," that the Bill contemplated granting the President specific power to legislate.

The bill, however, as reported by the Committee in the succeeding March (Mr. Adamson being of the Committee), struck out these provisions.

From the above it will be seen that the attention of the Committee was specifically called to the question as to whether it should vest the President with legislative power, and a bill containing specific and appropriate language for this purpose was presented to the Committee by the then Secretary of War. The Committee, however, did not adopt a bill containing such powers.

Faithfully yours,
(Sgd.) T. W. Gregory,
Attorney General.

(See File, Rec. Bu., P. C., Bal Hts., 94-L 6)

Later on, Judge Feuille prepared a proposed amendment to Section II of the Panama Canal Act, which read as follows:

> "Section 2. That all laws, orders, regulations ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone, and the sanitation of the cities of Panama and Colon and their adjacent harbors, and the construction and operation of the Canal, are hereby ratified and confirmed as valid and binding without prejudice to the power of the President to alter, amend or repeal the same."

This amendment was submitted to Mr. Fitzgerald, Chairman of the House Appropriations Committee, and evidently was given due attention by Congress, who declined to enact it. See Annual Report, Governor Panama Canal for year 1915, page 460. See also, Rec. Bu., P. C., Bal. Hts., File 94-L-6.

When it was found necessary that some existing police, sanitation and quarantine ordinances be changed, and that automobile regulations and rules of the road be made and promulgated, we find Col. Goethals, the then Governor of the Panama Canal, writing the following letter to the Secretary of War:

> Balboa Heights, November 18, 1915.
>
> The Honorable
> Secretary of War,
> Washington, D. C.
>
> Sir: I beg to acknowledge the receipt of your letter of the 4th instant relative to tax on automobiles in the Canal Zone.
>
> When the Committee on Appropriations visited the Isthmus a year ago, the difficulties that were met in the administration, due to the

fact that under the interpretation of the Attorney General the President could not modify or revoke Executive Orders issued prior to the passage of the Panama Canal Act, were discussed, and at the suggestion of the Chairman of the Committee, a provision was drafted with the hope that it might be incorporated as an item in the Sundry Civil Bill making appropriations for the Canal. The suggested amendment was submitted to the Chairman of the Committee on Interstate and Foreign Commerce, who objected to the insertion of the provision, and also to any change in the Panama Canal Act which would give the authority to the President of making laws for the Canal Zone. A revision of the laws was suggested, with a view of submitting them to the action of Congress, but conditions are constantly changing on the Isthmus as to make this method impracticable, and it was hoped that Congress might see its way clear to authorize the President to take action in administrative matters, and it was intended to make another appeal to Congress at the coming session with this in view.

Congressman Adamson, Chairman of the Committee on Interstate and Foreign Commerce in the last Congress, visited the Isthmus recently for the purpose of conferring with me about existing conditions, and with regard to any legislation that might be needed. In addition to the tolls, this question of amending Section 2 of the Panama Canal Act was discussed with him at some length, but he felt that legislation in such form would not be enacted. The inconveniences that would result from having Congress make police ordinances for the Canal Zone, which might need amendment very soon after their enactment, insomuch as the transition period from construction to operation is still on, was brought to his attention, and Mr. Adamson finally suggested that Congress could authorize the Presi-

dent to establish rules and regulations for the various activities of the Panama Canal not provided for, and such an act could carry with it a penal provision for any violation of the rules and regulations that might be established by the President.

Under these circumstances a Bill will be drafted along the lines suggested by Mr. Adamson, for submission to Congress through you. If this be enacted it will enable the modification of the automobile tax you desire. The rate of taxation for automobiles is high and should be modified. A reasonable rate that would be recommended in case the President had authority to act, would be ($10 per annum for automobiles of 29 h.p. or less, $15 for automobiles of 30 h.p. or more, provided the automobiles are for personal use only. When such automobiles are used for hire, the rate should be doubled. For trucks and busses the rate for Class 1, less than 1 ton, $20; for Class 2, one to three tons, $30; for Class 3, three tons or more, $40; for motorcycles, $5 per annum. We should however, agree to issue reciprocating licenses with Panama, for automobiles for personal use only, $3 and $5, respectfully, automobiles for hire, $10 and $15, respectively, motorcycles, $2 per annum, and for trucks and busses, $10, $15, and $20, respectfully.

Respectfully,
(Signed) Geo. W. Goethals.

In duplicate
GWGccm.

See File, Rec. Bur., P. C., Bal. Hts.,
28-H-16; 51-H-12, Part I.

On date of March 15, 1916, Mr. Frank Feuille, the then Special Attorney for the Panama Canal addressed a letter to Lt. Col. Chester Harding, acting Governor

of the Panama Canal, in which Judge Feuille made the following statement:

> "I am enclosing herewith a draft of a proposed bill for submission to Congress, through proper channels, on the subject of licenses on motor vehicles operated in the Canal Zone; prohibiting the use of flare lights on vehicles except under special conditions; limiting the speed of motor vehicles; * * *.
>
> "Section II of the Panama Canal Act ratifies and confirms all orders and resolutions issued by authority of the President, until such time as Congress shall otherwise provide. The Attorney General of the United States has ruled that the Executive Orders issued prior to the Panama Canal Act are not subject to amendment by the President, and can only be amended by Congress. Mr. Adamson, Chairman of the Committee on Interstate and Foreign Commerce in the House of Representatives, concurs in that opinion * * *
>
> Respectfully,
> (Signed) FRANK FEUILLE,
> *Special Attorney.*
>
> ff/ws.
> Enclosures.
>
> See Files, Record Bur. P. C. Bal. Hts. 28-H-16; 51-H-12, Part I.

Finally, as the result of nearly two years' strenuous effort on the part of the Governor of the Panama Canal, the Secretary of War, the Special Attorney, Judge Feuille, and others, Congress passed the Act of August 21, 1916, by which a few limited powers were given to the President to make or change any of the regulations which had been ratified and continued upon the Canal Zone by the ratification clause of the Panama Canal Act.

By Act of August 21, 1916, the President was authorized:

1. To make rules in matters of sanitation, health and quarantine;
2. To make rules and regulations for the levying, assessing and collecting of certain taxes;
3. To make rules of the road, and regulations concerning the taxing and operation of motor vehicles; and
4. To make port regulations, concerning immigration.

(See Ex. Order of Feb. 6, 1917.)

It required a special Act of Congress (Act of August 21, 1916) to allow the President to change, modify, repeal, alter, or amend anything that has been enacted as law, regulations, orders, or ordinances prior to the enactment of the "Panama Canal Act." It is significant that that portion of the proposed bill which would have given the President the power to change regulations theretofore made was striken out by Congress.

> "The proceeding of the legislature in reference to the passage of an act may be taken into consideration in construing the act. Thus the reports of committees made to the legislature have been held to be proper sources of information in ascertaining the intent or meaning of the act. Amendments made or proposed and defeated, may also throw light on the construction of the act as finally passed, and may properly be taken into consideration."
>
> Lewis' Sutherland Statutory Construction, Vol. II, par. 470.

> "The intention of the lawmaker constitutes the law."

Atkins v. Fiber Co., 18 Wall., 272: 21 L. Ed. 841.
Jones v. New York G. & I. Co., 101 U. S. 622: 25 L. Ed. 1030.

A thing within the intention of the makers of a statute is as much within the statute as if it were within the letter.

United States v. Babbit, 1 Black, 44; 17 L. Ed. 94.

A legislative act is to be interpreted according to the intention of the legislature.

Wilkinson v. Leland, 2 Pet. 627; 7 L. Ed. 542.
Priestman v. United States, 4 Dall. 28: 1 L. Ed. 727.
Binney v. C. & O. Canal Co., 8 Pet. 201: 8 L. Ed. 917.
United States v. Fisher, 2 Cranch, 358; 2 L. Ed. 304.
Indianapolis & St. L. Co. v. Horst, 93 U. S. 291: 23 L. Ed. 898.
The Paulina v. United States, 7 Cranch, 52: 3 L. Ed. 266.

Statutes are to be construed to give effect to the presumed and reasonably probable intention of the legislature.
Webster v. Cooper, 14 How. 488: L. Ed. 510.

It cannot be reasonably construed, under the principles of American Government, that Congress intended to give to the President as to the Panama Canal and the Canal Zone, unrestricted powers of government over which the courts can exercise no direction. There cannot be such an autocrat. The Government of the United States cannot be reduced to a bureaucracy.
Smith vs. Jackson, 241 Fed. 747, 758. affirmed in 246 U. S., p. 388.

> In whatever language a statute may be framed, its purposes and its constitutional validity must be determined by its natural and reasonable effect.
>
> Henderson v. Wickman, 92 U. S. 259: 23 L. Ed. 543.

For the reasons above given it is most respectfully submitted that this cause should be remanded to the District Court of the Canal Zone with instructions to grant the relief prayed if proof shows the facts stated in the Bill to be true.

Respectfully submitted,

HARRY A. HEGARTY,
JOHN N. BREEN,
Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 48

HARVEY McCONAUGHEY, for himself and others, employees of The Panama Canal and of the Panama Railroad Company, Appellant,

versus

J. J. MORROW, Governor of The Panama Canal; H. A. A. SMITH, Auditor of The Panama Canal; and R. W. GLAW, Paymaster of The Panama Canal.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEES

G. H. MARTIN,
District Attorney, Canal Zone,
Attorney for Appellees.

INDEX.

	Page.
STATEMENT OF THE CASE	3
ARGUMENT	4
First Point	4
Second Point	8
Third Point	9
ANSWER TO BRIEF OF APPELLANTS	16

AUTHORITIES CITED.

ACTS OF CONGRESS:

Panama Canal Act, August 24, 1912	5–6, 15, 21, 22, 23
32 Stat. L., p. 481	13
33 Stat. L., p. 429	14
36 Stat. L., p. 1133	4
37 Stat. L., p. 560	14
38 Stat. L., p. 803	4
42 Stat. L., p. 1004	6

CASES CITED:

Belknap *v.* Schild, 161 U. S., 10	10
Blumenstock Bros., etc. *v.* Curtis Pub. Co., 258 Fed., 927	5
Bowman *v.* Bradley, 151 Pa. St., 351, 17 L. R. A., 213	27
Carr *v.* U. S., 98 U. S., 433	9
Chamberlain *v.* Q. & C. Co., 260 Fed., 933	5
Church *v.* Froislie, 37 Minn., 447, 35 N. W., 260	27
Commonwealth *v.* Johnson, 144 Pa. St., 377, 22 Atl., 703	25
24 Cyc., 880	27
Davis *v.* Williams, 130 Ala., 530, 30 So., 488, 54 L. R. A., 749	27
Higgins *v.* Downs, 91 N. Y., Supp. 937	25
Hopkins *v.* Clemson College, 221 U. S., 636	11
Kansas *v.* U. S., 204 U. S., 331	9
Kerrins *v.* People, 60 N. Y., 221, 19 Am. Rpts., 158	27
Louisiana *v.* Jumel, 108 U. S., 711	11
Louisiana *v.* McAdoo, 234 U. S., 627	9, 10, 11
McConaughey *v.* Morrow, 279 Fed., 617	20–22
Marbury *v.* Madison, 1 Cranch, 137	11
Minnesota *v.* Hitchcock, 185 U. S., 373	9
Mississippi *v.* Johnson, 4 Wall., 475	10
New York Guaranty Co. *v.* Steele, 134 U. S., 230	11
Nickels *v.* Pullman Co., 263 Fed., 551	5
Oregon *v.* Hitchcock, 202 U. S., 60	9
Palmer *v.* Cheseboro, 55 Conn., 114, 10 Atl., 508	25
People *v.* Powers, 41 N. Y., Supp. 858	24

Page.

Platt *v.* San Francisco, 110 Pac., 304 24
Presbey *v.* Benjamin, 169 N. Y., 377, 58 L. R. A., 317 27
Randolph *v.* Josselyn, 59 Vt., 557, 10 Atl., 577 25
Richmond, etc. R. R. Co. *v.* Richmond, 96 U. S., 521 24
School District *v.* Batsche, 106 Mich., 330, 29 L. R. A., 576 27
Shapley *v.* Cohoon, 263 Fed., 893 5
Smith *v.* Jackson, 241 Fed., 747, 246 U. S., 388 32
Snedeker *v.* Powell, 32 Kans., 396, 4 Pac., 869 27
Stanley *v.* Schwalbey, 162 U. S., 255 9
U. S. *v.* Brown, 281 Fed., 657 5
Ure *v.* Ure, 185, Ill., 216, 56 N. E., 1087 25
Walker *v.* Ford, 269 Fed., 877 9
Youngworth *v.* Jewell, 15 Nev., 45 25

MISCELLANEOUS AUTHORITIES:

Circular of Colonel Goethals, March 30, 1914 29
Congressional Record, 62d Cong., 2d Sess., Vol. 48, p. 3493 22
Executive Order, January 27, 1914 29
Executive Order, February 2, 1914 30
Laws of the Canal Zone, pp. 61, 78 17
Minutes of Meetings of Isthmian Canal Commission:
100th Meeting, October 30, 1905 17
120th Meeting, February 13, 1907 17
129th Meeting, June 11, 1907 18–19
137th Meeting, December 7, 1907 18
The Canal Record, January 22, 1908, vol. 1, p. 162 18–19
The Canal Record, April 1, 1914, vol. 7, p. 297 29

IN THE SUPREME COURT OF THE UNITED STATES

HARVEY MCCONAUGHEY,
et al, employees of The Panama Canal and Panama Railroad Company.

vs.

J. J. Morrow, H. A. A. Smith, and Robert Glaw.

No. 48

STATEMENT OF THE CASE.

This is an appeal to this court from the judgment and decree of the United States Circuit Court of Appeals, Fifth Circuit, filed April 11, 1922. The action was originally brought in the United States District Court for the Canal Zone to enjoin J. J. Morrow as Governor of The Panama Canal, H. A. A. Smith its Auditor, and R. W. Glaw its Paymaster, from deducting from the compensation of the plaintiff and others a charge for rent, fuel and lights under the Executive Order of the President of the United States of December 3, 1921. (Transcript of Record, pp. 2 to 33.) The defendants appeared and by motion to dismiss challenged the jurisdiction of the District Court as to the parties and the subject matter of the action on the grounds that:

(1) The suit was in effect a suit against the United States;

(2) The defendants are officials of the executive branch of the United States, acting in their several capacities by and under the direction of the President of the United States; and

(3) The Executive is a coordinate branch of the Government and can not be enjoined by the judicial

branch of the Government. (Transcript, pp. 37–38.)

This motion was sustained and the action dismissed by judgment of said District Court duly made and entered January 5, 1922 (Transcript, pp. 39 to 73), and appeal and writ of error were prosecuted by the plaintiffs to said Circuit Court of Appeals (Transcript, pp. 77 to 92). On March 8, 1922, these respondents filed in said Circuit Court of Appeals a motion to dismiss the appeal on the ground that there was no right of appeal in the action to the Circuit Court of Appeals, but only a right of appeal to the Supreme Court of the United States under Section 238 of the Judicial Code, and jurisdictional grounds (Transcript, pp. 94–95). On April 11, 1922, the said Circuit Court of Appeals duly filed its opinion and entered its judgment affirming the judgment and decree of said District Court. (279 Fed. 617.) (Transcript, pp. 96–101.)

ARGUMENT.

The Appellees submit the following points and authorities:

I.

THAT THE CIRCUIT COURT OF APPEALS HAD NO JURISDICTION OF THE APPEAL IN THIS ACTION, AND CONSEQUENTLY THIS COURT HAS NO JURISDICTION.

The jurisdiction of the Circuit Court of Appeals is defined by Section 128 of the Judicial Code of the United States (36 Stat. L., p. 1133, as amended by 38 Stat. L., p. 803). So far as that section is applicable to this case it provides for appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts—in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section 238.

It follows therefore that the Circuit Court had no jurisdiction in this case if the appeal or writ of error might have been taken directly to the Supreme Court.

Section 238 of the Judicial Code of the United States (36 Stat. L., p. 1157, as amended by 38 Stat. L., p. 803) provides what appeals and writs of error may be taken from the District Courts directly to the Supreme Court. The provision of this section applicable to this case is as follows:

> "In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It seems to the Appellees by the express enactment of Congress that these statutes deprived the Circuit Court of Appeals of jurisdiction to entertain, consider and decide this action, for the question of jurisdiction was the sole question in the case. Authorities on this point are numerous, and only a few of them will be cited, in support of the following rule:

"The Circuit Court of Appeals is without jurisdiction of an appeal from a decree of a District Court dismissing an appeal on the ground of want of jurisdiction; the power to review is exclusively in the Supreme Court."

> Chamberlain et al, *v.* Q. & C. Co., et al., 260 Fed., 933;
> Shapley *v.* Cohoon, 263 Fed., 893;
> Blumenstock Bros. etc., *v.* Curtis Pub. Co., 258 Fed., 927;
> Nickels *v.* Pullman Co., 263 Fed., 551;
> U. S. *v.* Brown, 281 Fed., 657, at 659.

From the foregoing decisions it appears to be settled that the Circuit Court had no jurisdiction to entertain or decide this controversy, unless some provision of the Act of Congress of August 24, 1912, known as "The Panama Canal Act," enlarged the appellate jurisdiction of the Circuit Court of Appeals to entertain appeals

from final judgments of the District Court of the Canal Zone. Section 9 of the Panama Canal Act (37 Stat. L., p. 560) relating to this matter is as follows:

> "The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the District Court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charged is punishable as a felony. And such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said circuit court of appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States."

It seems to me apparent from this provision that the Circuit Court of Appeals of the Fifth Circuit, in appeals from the judgments and decrees of the District Court of the Canal Zone, has no greater jurisdiction than that court or any other Circuit Court of Appeals would have under Sections 128 and 238 of the Judicial Code of the United States, heretofore cited. This view is confirmed by the action of Congress in the enactment of an amendment to Section 9 of the Panama Canal Act (42 Stat. L., 1004), wherein the portion of Section 9 above quoted is made to read as follows:

> "(*b*) The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdic-

tion to review, revise, modify, reverse, or affirm the final judgments and decrees of the district court of the Canal Zone, and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, and in cases in which the value in controversy exceeds $1,000, to be ascertained by the oath of either party or by other competent evidence, and also in criminal cases wherein the offense charged is punishable as a felony; *and also in civil and criminal cases in which the jurisdiction of the court is in issue, but whenever any such case is not otherwise reviewable in said appellate court the question of jurisdiction alone shall be reviewable by said appellate court.* And such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States. *Cases pending in the said Circuit Court of Appeals at the time of the passage of this Act shall not be affected hereby, but the same shall be disposed of as though this Act had not been enacted.*"

It will be noted from the italicized portions of the amendment made in 1922 that the Circuit Court of Appeals is given specific jurisdiction upon appeal from the Canal Zone court of jurisdictional questions—a jurisdiction it did not before have. This is plainly an interpretation by Congress of the original Panama Canal Act that the same did not confer this jurisdiction. The quoted terms of the amendment also show that this action, which was decided in April, 1922, was not, and is not to be, in any manner, affected by the amendment.

It therefore appears that the Circuit Court of Appeals for the Fifth Circuit had no jurisdiction of this action; had no power or authority to decide it; and consequently this court has no jurisdiction.

II.

THIS SUIT IS, IN EFFECT, A SUIT AGAINST THE UNITED STATES, AND IT HAS NOT CONSENTED TO BE SUED, RESULTING IN LACK OF JURISDICTION IN THE COURTS.

It appears in this proceeding that certain lump sum appropriations have been made by the Congress of the United States for certain specific purposes, one of which is the maintenance and operation of the Panama Canal. It is the contention of the appellants that these appropriations were made, in part, for the purpose of paying the compensation of those employed under the authority of the President in maintaining and operating the Panama Canal, and this is conceded. Under the plain power given to the President to maintain and operate the Canal and employ such persons as he may see fit for that purpose, the President, or those to whom he has delegated the authority, has the power to agree with the employees upon the compensation which each shall receive. Doubtless this was done in the case of the plaintiff and every other person employed in the maintenance and operation of the Canal. This is an agreement between master and servant, and is subject to any offsets or deductions which the master may have against the wages or salary or compensation of the servant. The appellees are assuming for the purposes of this argument that the President had the authority to require payment for rent, water, fuel and lights in quarters used by employees of the Government on the Canal Zone. What the appellants are seeking to do in this case

indirectly is, (1) to increase their compensation beyond the amount agreed upon, or (2) to have the use of the property of the United States without compensation. In the first case, if they are successful the money appropriated by Congress will be depleted to the amount measured by the charges for rent, water, fuel and lights, or, in the second case, the property of the United States will be used by the appellants without paying any compensation therefor. In either event this action is a suit against the United States, and the effect of a judgment in favor of the plaintiffs would be to burden the revenues of the United States by a considerable amount or grant to the appellants a right to the use of Government property without compensation.

The United States being, therefore, the real party in interest and the only party whose property rights will be affected by a judgment in this action, and the United States not having consented to be sued, the District Court was without jurisdiction of the subject matter of the action; was correct in its judgment dismissing the case, and this Court should dismiss the case for lack of jurisdiction.

Carr *v.* U. S., 98 U. S., 433.
Stanley *v.* Schwalbey, 162 U. S., 255.
Minnesota *v.* Hitchcock, 185 U. S., 373.
Oregon *v.* Hitchcock, 202, U. S., 60.
Kansas *v.* U. S., 204 U. S., 331 at 341.
Louisiana *v.* McAdoo, 234 U. S., 627.
Walker *v.* Ford, 269 Fed., 877.

III.

THE APPELLANTS SEEK BY INJUNCTION, TO RESTRAIN THE PRESIDENT AND THOSE ACTING BY HIS AUTHORITY, IN THE PERFORMANCE OF EXECUTIVE DUTIES, INVOLVING THE EXERCISE OF JUDGMENT AND DIS-

CRETION, RESULTING IN LACK OF JURISDICTION IN THE COURTS TO INTERFERE THEREWITH.

In a case of this kind an injunction can not issue against the United States or officers of the United States acting under the authority of the Executive.

Belknap *v.* Schild, 161 U. S., 10.
Louisiana *v.* McAdoo, *supra.*

The appellees do not contend that subordinate officers of the United States may not be proceeded against by mandamus or by writ of injunction where the performance of duty is merely ministerial, where the performance thereof is not accompanied by the exercise of judgment and discretion on the part of the official, nor in those cases where the subordinate officer is acting illegally and without authority of law, and where great or irreparable injury will result from a continued performance of the illegal acts. But this is not such a case, all of which will be pointed out in this brief in the following pages.

The President of the United States can not be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional; and it makes no difference whether such incumbent be described in the bill as President or simply as a citizen of a State.

Mississippi *vs.* Johnson, 4 Wall, 475.

In this case the distinction between the legislative, executive, and judicial branches of the Government is clearly pointed out, and with equal clearness it appears that no department can invade the domain or restrain the exercise of the powers of any other department. This court uses the following language with respect to the matter:

> "The Congress is the legislative department of the government; the President is the executive

department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences."

* * * * * * *

"It has been suggested that the bill contains a prayer that, if the relief sought can not be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson, is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office can not be received, whether it describes him as President or as a citizen of a State."

The courts will not interfere with the ordinary functions of the executive department of the Government.

Louisiana *v.* McAdoo, *supra.*
N. Y. Guaranty Co. *v.* Steel, 134 U. S., 230.
Louisiana *v.* Jumel, 108 U. S., 711.
Hopkins *v.* Clemson College, 221 U. S., 636.

In Marbury *v.* Madison (1 Cranch, 137) the Supreme Court of the United States, in discussing the relations existing between the President of the United States and the heads of departments, uses the following language:

"The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hestitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful

that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the Cabinet, and to intermeddle with the prerogatives of the Executive.

"It is scarcely necessary for the courts to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the Executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court."

* * * * * * *

"Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation."

* * * * * * *

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual

> rights, and being intrusted to the Executive, the decision of the Executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts."

The rules so announced are particularly pertinent in this case. All the acts of Congress from the inception of the undertaking to construct an interoceanic canal across the Isthmus of Panama place the control of that undertaking in the hands of the President and such subordinate officers as he may designate. These subordinate officers must conform precisely to the will of the President. They are the mere instruments by which that will is translated into action. The first act of Congress, approved June 28, 1902, (32 Stat. L., p. 481), authorizing the President to acquire the territory now known as the Canal Zone, created an Isthmian Canal Commission, and in Section 7 thereof said act provides:

> "Said Commission shall in all matters be subject to the direction and control of the President, and shall make to the President annually and at such other periods as may be required, either by law or by the order of the President, full and complete reports of all their actings and doings * * * *."

Said act further empowered the President to acquire the properties of the French Canal Company, to acquire the right of way for the Canal and the Canal Zone, to pay for the property, and, through the Isthmian Canal Commission, cause to be excavated, constructed and completed a ship canal from the Caribbean Sea to the Pacific Ocean.

April 28, 1904, Congress enacted a law (33 Stat. L., 429) wherein the President was authorized to acquire the Canal Zone and to pay therefor which, contained the following provision:

> "Sec. 2. That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property and religion."

Under these laws the President appointed an Isthmian Canal Commission, and that Commission continued to function until the year 1914. Under that commission not only was the Canal constructed, but the Canal Zone was put in a sanitary condition and governed under the laws, rules and regulations established by the Isthmian Canal Commission.

August 24, 1912, Congress enacted another law (37 Stat. L., 560), known as "The Panama Canal Act," wherein, in Section 3, the President is authorized to declare that the Canal Zone is necessary for the construction, maintenance, and operation, sanitation or protection of the Panama Canal, and to extinguish all claims and titles of adverse claimants and occupants; in Section 4, that when, in the judgment of the President, the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive

Order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist, and authorized the President thereafter to complete, govern, and operate the Panama Canal, and govern the Canal Zone, or cause them to be completed, governed and operated through a Governor of The Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the Canal and Canal Zone; and authorized the President to appoint a Governor of the Canal Zone and

> "all other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may, by law, regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than 25 per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States."

By Section 5 the President is authorized to prescribe the rate of tolls that shall be paid by vessels passing through the Canal; and various other powers were conferred upon the President by the terms of this act.

From a consideration of these several enactments it appears that the Congress has conferred upon the President, unless expressly reserved, full and complete power and authority; First, for the construction of the Canal, and, Secondly, for the care, management, maintenance, sanitation, government, operation and protection of the Panama Canal and Canal Zone. The Governor, the

Auditor, and the Paymaster of The Panama Canal, who are the appellees in this action, were appointed by the President and by his authority, and were acting under the Executive Order of the President of December 3, 1921, requiring the payment by employees of the Canal and Canal Zone of rent, fuel, electric current and water supplied to them by the Government; and this action is brought for the purpose of restraining them from carrying out the order of the President of the United States in these respects.

It therefore clearly appears in this case that the suit is brought to enjoin, in effect, the President of the United States, through his appointees, from carrying out a procedure adopted for the operation of the Panama Canal and promulgated by Executive Order, and that this action, if it may be maintained, will subject the executive department of the United States to interference by the judicial department in a matter where the executive department has the right to exercise judgment and discretion. We submit, therefore, that the District Court was without jurisdiction to entertain this action, and that this court is without jurisdiction so to do.

IV.

ANSWER TO APPELLANTS' BRIEF.

It is contended by the appellants in their brief:

(1) That the Panama Canal Act validated all previous laws, rules, regulations and ordinances of the Canal Zone, including the regulation for free quarters;

(2) That under the terms of the Panama Canal Act the President had no power to promulgate the Executive Order of December 3, 1921; and

(3) That the President, and those acting under his authority, have no power under the Panama Canal Act to lease the quarters on the Canal Zone to employees.

Without prejudice to the question of jurisdiction presented in this brief, the appellees answer the brief of the appellants, as follows:

Appellants quote in their brief (p. 5) Section 53 of Act No. 8 of the Laws of the Canal Zone, providing that employees whose salaries are $1,000 or more per year shall be entitled to quarters, or in lieu thereof commutation at 8 per centum of the annual salary. This act provides for the organization of the executive branch of the Government of the Canal Zone, and the section in question is to be found in that part of the act dealing with education. (Laws C. Z., 61 and 78). It was adopted September 2, 1904. On the same page of appellants' brief the Isthmian Canal Commission declares that this is a tentative regulation under date of December 3, 1904. (Appellants' brief, p. 5.) Frequent changes were made in these regulations by the Isthmian Canal Commission after 1904, and up to and including December 7, 1907, the same being treated at all times as regulations imposing conditions of employment. At its 100th meeting, October 30, 1905, the Commission provided as follows:

> "Where practicable and in the best interests of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time, and if quarters are not available he will be granted in lieu thereof a sum payable monthly equal to 15 per centum of his monthly compensation."

At its meeting on February 13, 1907, it adopted the following regulation:

> "Whenever practicable and in the best interests of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time."

At its 129th meeting, June 11, 1907, in prescribing general conditions of employment, the Commission provided:

> "Where practicable and in the best interests of the service, an employee will be provided with such quarters on the Isthmus as may be available from time to time. Family quarters will be assigned when available, assignments to be made in accordance with the date of application."

At its 137th meeting, December 7, 1907, the Commission amended the regulations adopted on June 11, 1907, as follows:

> "Where practicable and in the best interests of the service, an employee will be provided with such bachelor quarters on the Isthmus as may be available from time to time. No agent of the Isthmian Canal Commission is authorized or empowered to promise family quarters to employees, and notice is particularly called to the fact that the supplying of family quarters is not a condition of employment." (See Minutes of Meetings of the Isthmian Canal Commission, above referred to.)

On September 4, 1907, the Isthmian Canal Commission began the publication of an official paper known as *The Canal Record*. As stated thereon the paper was "issued free to all employees of the Commission whose names were on the gold roll." Under date of January 22, 1908, the regulation adopted December 7, 1907, was published with the following explanation:

> "Owing to the large number of applications for family quarters on file and the great expense involved in the construction of such quarters, as well as the insufficiency of available funds, it was determined at the 137th Meeting of the Isthmian Canal Commission, held December 7, 1907, that the general conditions of employment should be

> changed with the view of relieving the Commission of the obligation to furnish family quarters to employees engaged for service after January 1, 1908. The new conditions became effective January 1, 1908, and will apply to all employees appointed on and after that date." (*The Canal Record*, Vol. I, p. 162.)

As a matter of fact, the Isthmian Canal Commisson ceased to pay commutation of quarters after January 1, 1907, and in order that there be no mistake about the matter, at the meeting of June 11, 1907, the Commission adopted this further provision:

> "All appointments made prior to this Resolution are hereby terminated, to take effect at the end of the next leave period accruing under such appointment. Conditions of service thereafter will be in accordance with the rules and regulations of the Commission."

The appellants, after quoting Section 53 of Act No. 8, on p. 5 of their brief, say on p. 6 that—

> "The said Commission, on February 13, 1907, adopted regulations governing employment setting forth the same privileges."

And on p. 13 appellants say—

> "and no change up to the time of the passage of the Panama Canal Act was made, either by Congress or the Commission."

But the court will observe from the quotations made above that the original regulations were entirely abandoned, and that at the time the Panama Canal Act was passed, August 24, 1912, the regulations were based upon the enactment of the Commission of June 11, 1907 and December 7, 1907.

No extended argument is necessary upon these matters. It is quite clear that the Commission changed these regulations from time to time to meet the circumstances as they arose, and that the last authorita-

tive regulation was adopted June 11, 1907, as amended at the Meeting of December 7, 1907; and all those regulations amount to is the provision that when practicable and in the best interests of the service, quarters will be furnished, but that no agent of the Isthmian Canal Commission had authority to promise quarters as a condition of employment. As is said by the Circuit Court of Appeals in this case (279 Fed., 617, at 620), after quoting the regulation of February 13, 1907:

> "We understand that the just-quoted regulation is the one on the subject which was in force at the date of the enactment of the Panama Canal Act on August 24, 1912. In behalf of the plaintiff it is contended that the above-quoted provision of section 2 of that act had the effect of keeping the just-quoted regulation in force 'until Congress shall otherwise provide.' If that position is a tenable one, it does not follow that the plaintiff has an enforceable right to continue to occupy, free of rent, the government property which was assigned for his use. The language of that regulation negatives the conclusion that thereby the employer relinquished or abridged its right to determine, in the case of any employee, whether it is or is not practicable and in the best interests of the service to provide such employee with quarters on the Isthmus.
>
> "The matter remained one as to which the employer had and retained a right to exercise its unregulated and unqualified judgment or discretion. The terms of the regulation make the continuance of the privilege or benefit in question dependent upon the authorized representative or representatives of the employer continuing to be of opinion that it is in the best interests of the service not to change the policy or practice. An employee has no legally enforceable right to what the employer has the option to grant or withhold as the latter's judgment or discretion may dic-

tate. The continuance of the arrangement practically was no more assured than it would have been if a tenancy at the will of the employer had been created. The existence of the regulation and what was done under it brought about a situation like that resulting from a contract which is so uncertain and contingent in its terms as to be legally unenforceable. Brown *v.* Camp C. C. A.) 275 Fed., 612; Wald's Pollock on Contracts (3d Ed.) 48, 49."

The Panama Canal Act, Sec. 2, provides:

> "That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide."

It is this provision which the appellants contend ratifies the regulations of the Isthmian Canal Commission relating to quarters and which gives to the employees, as contended, the right to the use of quarters free. The purpose of adopting this section is stated in the report of the Committee accompanying the introduction of the bill in the House of Representatives, as follows:

> "This section is intended to ratify and confirm existing laws and organizations under which the Canal Zone is governed and the Canal is being constructed. The existing judicial system is likewise recognized and confirmed. While not regarded as absolutely essential, all this is deemed appropriate for the reason that at the end of the 58th Congress, in default of renewed legislation, the law for the temporary government lapsed, and the President not only preserved the status established under the temporary provision, but also extended and continued the exercise of all necessary authority and functions of government

> de facto in so far and whenever necessary authority was found not to have been conferred by the Canal Act and various subsequent acts of Congress. The Committee approves of the course pursued by the Executive and recommends legislative approval thereof as appropriate." (*Cong. Record*, 62d Cong., 2d Sess., vol. 48, p. 3493.)

Section 2 of the Panama Canal Act was therefore merely a validating statute ratifying and confirming such things as had been done by the President or by his authority in the conduct of the Panama Canal project and the government of the Canal Zone after the end of the 58th Congress. And Congress had no intention, in our judgment, by ratifying or confirming these regulations of the Commission, of prescribing permanent rules and regulations respecting conditions of employment on the Canal Zone, nor did it intend to limit the right of the President, and those authorized by him, to prescribe the conditions of employment, by contract or otherwise, of those employed after the passage of the act or those who might continue in employment after the passage of the act in completing and operating the Panama Canal and governing the Canal Zone. (McConaughey *v.* Morrow, 279 Fed., 617, at 621.)

This brings us to the consideration of the second contention of the appellants, that the President had no power under the Panama Canal Act to promulgate the Executive Order of December 3, 1921, providing that thereafter employees should pay rent for quarters and for fuel, light, and water furnished. Section 4 of the Panama Canal Act, in so far as it is relevant to this question, reads as follows:

> "That when in the judgment of the President, the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is author-

ized by Executive Order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist, and the President is authorized thereafter to complete, *govern*, and *operate* the *Panama Canal*, and *govern the Canal Zone*, or cause them to be completed, *governed*, and *operated*, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, *operation*, *government*, and protection of the *canal* and *Canal Zone*.

* * * The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified.

* * * All other persons necessary for the completion, *care*, *management*, maintenance, sanitation, *government*, *operation*, and protection of the Panama Canal and Canal Zone *shall be appointed by the President, or by his authority, removable at his pleasure*, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than 25 per centum the salary or compensation paid for the same or similar service to persons employed by the Government in continental United States."

It will be noted from this section that the grant of powers to the President is broad. He is authorized to complete the Canal and to govern and operate the Panama Canal and govern the Canal Zone, or cause the same to be done through a governor of the Panama Canal, and such other persons as he may deem competent to discharge the various duties in connection therewith. After providing that the President shall appoint the Governor, it provides that the President shall appoint

"all other persons necessary for the completion, *care, management*, maintenance, sanitation, *government, operation*, and protection of the *Panama Canal* and *Canal Zone*," and that all such persons shall be appointed by his authority and be "*removable at his pleasure.*" And the section further gives the President the power to fix the compensation of such persons. The terms "govern," "government," "operation," "management," as used in this section, have their ordinary meaning. The Standard Dictionary defines the term "govern" to mean, "to rule over according to the forms or usages of law; to control by authority." Webster's definition is the same. Synonyms are "control, direct, manage, rule." The word "govern" implies power to ordain and establish suitable police regulations. (Richmond, P. & F. R. R. Co. *v.* Richmond, 96 U. S. 521, at 528.)

"Government" is the exercise of authority in the administration of the affairs of a state, community, or society.

> People *v.* Powers, 41 N. Y., Supp. 858.
> Platt *v.* San Francisco, 110 Pac., 304, at 309.

In the latter case the Supreme Court of California says that—

> "Government is defined as being the exercise of authority in the administration of the affairs of a state, community, or society; the act of governing or state of being governed, especially authoritative administration of the affairs of a state or community. These definitions include every function which may lawfully be allotted to a municipality to perform. No other meaning can reasonably be attributed to the word 'government' as used in the section under consideration." (The section under consideration was section 8 of Article 11 of the Constitution of California, providing for a form of city government.)

The term "operate" is defined by the Standard Dictionary, as follows: "To conduct or manage the affairs of."

The word "manage" means to direct, control, govern, administer or oversee.

Comm. *v.* Johnson, 144 Pa. St., 377, 22 Atl., 703.
Youngworth *v.* Jewell, 15 Nev., 45, at 48.
Ure *v.* Ure, 185 Ill., 216, 56 N. E., 1087.

As used in the laws of Connecticut, which provide that conservators shall manage the estates of their wards, the word "manage" includes the leasing of the estates. (Palmer *v.* Cheseboro, 55 Conn., 114, 10 Atl., 508.)

The phrase "managed or cared for by them" in a will implies that the executors had the right to lease the property of the estate and receive the rents and profits. (Higgins *v.* Downs, 91 N. Y. Supp. 937).

The words "control and management" used in a will devising property to testator's son and declaring that he shall have the control and management of the same during life, mean that the son should have the use, possession, superintendence and protection of the property and the power of exercising a general restraint over the same until the happening of the event that will determine the taker of the fee, but it does not include the power of sale. (Randolph *v.* Josselyn, 59 Vt., 557, 10 Atl., 577.)

Whatever Congress may have intended by Section 2 of the Panama Canal Act ratifying previous laws, regulations, rules and ordinances of the Canal Zone, there can be no doubt as to what it meant in Section 4 of the act, where it constituted the President, acting either by himself or through others appointed by him, the employer of all persons other than the Governor for the completion, care, management, government and operation of the Panama Canal and the Canal Zone. Under that grant of authority the President is placed in abso-

lute control of the physical property of the United States in the Canal Zone, except that he has no power to sell the same. He may use any part or all of it to effectuate the purposes specified in Section 4. He may deny to any and every employee the right to use quarters on the Canal Zone. There is nothing in the law which requires any employee, other than the Governor, District Judge, United States Attorney, and United States Marshal, to reside in the Canal Zone. He may insist as a condition of employment that each employee shall sign a contract to pay for the use of his quarters furnished by the United States. To hold otherwise under the powers granted in Section 4 of the Panama Canal Act would be to abridge the freedom of contract guaranteed by the Constitution of the United States. Under the provision contained in Section 4 that employees are "removable at his pleasure," no employee has had, or could have, since August 24, 1912, a valid contract of employment upon any other terms. The President may therefore terminate the employment of any employee at any time and provide that if he desires to be reemployed it must be upon such reasonable terms and conditions as the President may fix. By the Executive Order of December 3, 1921, set forth at length in the appellants' complaint in this action, the President has fixed the terms of employment of all employees on the Canal Zone with respect to quarters, light, fuel, water, and sanitary charges.

The relation between the President and the employees of the Canal Zone is purely that of master and servant. Appellants concede this to be true in their brief at p. 26, where they say—

> "We believe, however, from the majority of the cases, that the relationship between appellants and the United States is simply that of master and servant, and the use of his quarters is an incident to his employment."

And they cite, among other cases, Bowman *v.* Bradley, 151 Pa. St., 351, 17 L. R. A., 213; Davis *v.* Williams, 130 Ala., 530, 30 So., 488, 54 L. R. A., 749; School Dist. *v.* Batsche, 106 Mich., 330, 29 L. R. A., 576, and other cases.

To which the appellees add the following citations:

24 Cyc., 880;

Snedeker *v.* Powell, 32 Kans., 396, 4 Pac., 869.

Kerrins *v.* People, 60 N. Y., 221, 19 Am. Rpts., 158.

Presbey *v.* Benjamin, 169 N. Y., 377, 57 L. R. A., 317.

Church *v.* Froislie, 37 Minn., 447, 35 N. W., 260.

Bowman *v.* Bradley (supra) seems to be the leading case upon this question, and in that case the Supreme Court of Pennsylvania uses the following language:

> "Was that right (the right to use a house upon the premises Bowman was employed to care for) an incident of the hiring, and dependent on the continuance of the relation of employer and employee, or had it an independent separate existence, so that he was to be treated as a tenant for years, with a right to remain in possession for one whole year, whether he remained in the employment of the owner or not? * * * This should be determined upon a consideration of the nature and purpose of the contract, and the character of the business to which it relates. * * * If the possession of the house be regarded as an incident of the hiring, the incident must fall with the principal. * * * It is not necessary that occupation of a house or apartments should be a necessary incident to the service to be performed in order that the right to continue in possession should end with the service. It is enough if such occupation is convenient for the purposes of the service, and was obtained by reason of the contract of hiring."

It is a matter of common knowledge that the Isthmian Canal Commission, up to the time it went out of existence, and the President and those under his authority since repaired a great many of the old French houses which the Government had acquired when it acquired the Canal Zone and built a very large number of other houses and buildings which have been used by the employees in the Canal Zone for quarters. These structures are in a number of different communities along the course of the Panama Canal and are situated at convenient places adjacent to the places where the employees perform their work. It is not necessary that the employees should live in these quarters, but it is convenient for them and for the Canal authorities that they should do so. When any particular person is employed in the Canal Zone and is assigned to duty he is also assigned quarters, where practicable, if the quarters are available, and when he ceases to be an employee his right to the use of the quarters assigned to him ceases. The use of these quarters is a mere incident to the contract of hiring, and under the Panama Canal Act as each employee is removable at the pleasure of the President or those acting under his authority, it follows as a natural consequence that when his employment ceases his right to the incidental use of quarters at once terminates.

Instead of adopting the Executive Order of December 3, 1921, it would have been just as effective for the President, directly or through the Governor of the Panama Canal, to say to each employee, "Your employment is terminated as of this date, together with all terms and conditions thereof. Hereafter if you desire to continue in the employment of the President in the Canal Zone you will be required to pay rental for your quarters and to pay for fuel, lights, water and sanitary service." In fact, this is precisely what was done in 1914, when the

President, by Executive Order of January 27, 1914, terminated the organization of the Isthmian Canal Commission and created a new organization, which is still functioning. Colonel Goethals, Chairman of the Isthmian Canal Commission, under date of March 30, 1914, as the last act of his work as Chairman of the Commission, issued a circular, which was published in *The Canal Record*, April 1, 1914, vol. 7, p. 297, containing these provisions:

> "1. The entire personnel of the organizations of the Isthmian Canal Commission and the Panama Railroad Company on the Isthmus is hereby notified that at the close of business on March 31, 1914, all contracts of employment will terminate, with the exception of those of employees on sick or injury leave, in which cases, the contracts will be annulled at the termination of the period of disability.
>
> "2. This action is necessitated by the discontinuance by law of the present organization on that date, the inauguration, on April 1, 1914, of the permanent organization for The Panama Canal, as provided in the Executive Order of January 27, 1914, and the adoption for all the present force, including the Panama Railroad Company's employees on the Isthmus, of new conditions of employment, as provided in the Executive Order of February 2, 1914.
>
> "3. All employees, except those noted in paragraph 1, who are on the rolls as of March 31, 1914, and who have not resigned or been notified that their services are no longer required, will be considered transferred to the new organization on April 1, 1914, and will from the date upon which service and compensation begin in the new organization be subject to the conditions of employment contained in the Executive Order of February 2, 1914, and to the further rules and regulations of the Governor, except that teachers will not be granted cumulative or travel leave."

The Executive Order of January 27, 1914, terminated the old organization under the Isthmian Canal Commission, and transferred it to a new organization. The memorandum accompanying that Order under date of February 2, 1914, contains the following provision with respect to quarters:

> "Where practicable, such bachelor quarters on the Isthmus as may be available from time to time will be assigned all employees desiring them. Family quarters, when available, will be assigned under such rules as may be prescribed by the Governor. A charge will be made for rent, fuel, and electric current at such time and in accordance with such regulations as the President may hereafter establish."

It thus appears that the Plaintiff and all others whom he represents, after the passage of the Panama Canal Act and after the creation of the new organization accepted and continued their employment under the new organization and under the rules and regulations thereafter to be adopted with respect to the use of quarters; and they knew, because they are bound to know the provisions of the Panama Canal Act, that they were removable at the pleasure of the President or those acting by his authority, and that upon removal from their employment their right to quarters terminated.

It is further contended by the appellants that while admitting that they are not lessees and that the relation of master and servant exists between them and the President, nevertheless that they have some sort of an interest in the quarters occupied by them which is susceptible of enforcement, and that the President has no power to lease the quarters on the Canal Zone. Under the authorities hereinbefore cited the President has the authority to lease these quarters and to exact rent therefor under the general authority of the Panama Canal

Act to govern, manage and operate the Panama Canal and the Canal Zone; but from the authorities above cited the use of the quarters is a mere incident to the employment, and when the employment ceases the employee has no further interest therein. The Executive Order of December 3, 1921, terminated in effect the employment of every employee in the Canal Zone, unless the employee was willing to consent to and abide by the terms and provisions of that order. . .

Appellants' brief calls attention to the final section of the Panama Canal Act where the "right to alter, amend, or repeal any or all of its provisions or to extend, modify, or annul any rule or regulation made under its authority, is expressly reserved." With respect to the first clause, Congress simply reserved the right to alter, amend, or repeal any of the provisions of the Panama Canal Act, and in the second clause it reserved the right to extend, modify, or annul any rules or regulations made under the authority of the Panama Canal Act. This does not relate in any manner to any prior laws, rules or regulations. As one instance, the Panama Canal Act gave the President the right, among other things, to fix the rate of tolls within certain limits, and by this reservation of power Congress has the power to change the rate of tolls at any time, notwithstanding what the President may have done with respect thereto.

It is also contended in the 4th Assignment of Error (Brief, p. 16) that by the Constitution, Congress has the power to dispose of and to make all needful rules and regulations respecting the territory or other property of the United States, and it is argued that Congress has not made any provision for the disposition of the property in the Canal Zone belonging to the United States. The ready answer is that Congress in the Panama Canal Act did make such provision. So far as the property of

the United States in the Canal Zone is concerned the President has the power to care for, manage and control the same, which gives to the President practically every power which he could exercise other than the power of sale. Can it be said with reason that the President has no power to regulate the use of the tugboats and barges and docks and the locks and the other property of like kind in the Canal Zone necessary to be used in the operation of the Canal? Can it justly be said that he has no power to build additional houses for quarters upon land of the United States in the Canal Zone? Are not the houses and the water plant and the electric-light plant just as much necessary equipment for the care and operation of the Canal as the tugs and barges and steam shovels and locks of the Canal Zone? Indisputably it seems to the appellants the President has full power and control over all these matters, including the terms and conditions for the use of quarters, the electric current and the water used by the employees in the Canal Zone.

Appellants have cited and rely upon Smith *v.* Jackson (241 Fed., 747), affirmed in 246 U. S., 388, as authority for the proposition that the injunction should be granted in this case. That case and the present case are not parallel. In the Smith-Jackson case the question involved was the salary of a District Judge appointed by the President for a definite term of 4 years at a definite salary fixed by Congressional enactment at $6,000 per year; and this was a part of the statutory organization for handling the judicial affairs of the Canal Zone. This statute (the Panama Canal Act) further provided that the District Judge should reside in the Canal Zone, and no provision was made by Congress either for or against his use of quarters. It appears that one of the laws of the Canal Zone validated by the Panama Canal

Act was a provision that the Judge should have quarters free or commutation of quarters to the amount of eight (8) per centum of the annual salary. And it appears that Congress had made a specific appropriation to pay the salary of Judge Jackson.

The plaintiffs in this action are administrative employees outside of the statutory organization. Their salaries are not fixed by statute. There is no specific appropriation to pay any particular salary or the total salary of employees. There is no requirement that they shall reside in the Canal Zone, and there is no specific requirement that they shall be furnished with quarters free. The employees of The Panama Canal are a part of the civil administration organization; their tenure of office is at the pleasure of the President; their compensation is to be fixed and agreed upon. In some instances it is based upon hourly service, in some on a daily, and in others on a monthly basis. The rates of pay have in the past and will be in the future changed from time to time. No employee knows until the end of the month how much he will receive, because it is not known until that time how much time he has devoted to the service of his employer. His compensation, therefore, is not a fixed sum, either by statute or regulation; and in no instance is there a specific appropriation for the payment thereof, but a general appropriation covering not only compensation to employees but many other items of expense in connection with the maintenance and operation of the Panama Canal and the government of the Canal Zone. There is no parallel or analogy between the Smith-Jackson case and this case, and the latter case is not an authority in this case.

We have noted and answered several matters contained in appellants' brief, and what we have said, as it appears to us, is all that need be said in answer thereto.

Other matters contained in the brief are fully answered by what has heretofore been said. It is therefore respectfully submitted:

(1) That this case should be dismissed upon jurisdictional grounds;

(2) If not so dismissed, that it should be affirmed upon the ground that the appellants are not entitled to any relief.

Respectfully submitted,

G. H. MARTIN,
District Attorney, and
Attorney for Appellees.

O